

## **Examining Procedural Unfairness and Credibility Findings in the United Kingdom**

### *Abstract*

*In the US and Canada research into decision-making by Immigration Judges has concluded that decisions depend on which government official decides the claim, the 'identity', gender and prior work experience of Immigration Judges and on the quality of legal representation. In this paper I argue that while decision-making is part of the explanation, reliance on an analysis of published statistics provides an incomplete picture of decision-making. I argue instead that a more comprehensive understanding of judicial decision-making based on ethnographic research which follows appeals is necessary, research which sees the judiciary as one of a number of institutions operating in a wider political field which influence the outcome of judicial decisions.*

### *Introduction*

Research has identified several intertwined issues that affect judicial-decision making which include, but are not limited to: (1) how Immigration Judges (IJs) convene and decide asylum and immigration appeals; (2) the effect of legal procedure on decision-making; (3) the extent to which IJ's rely upon ill-conceived notions of 'credibility' to refuse a claim; and (4) whether applicants can make effective use of the appellate system or judicial review to ensure that asylum decisions are fair.

IJ decision-making has primarily been analysed by scrutinizing written determinations.<sup>1</sup> Indeed, most research tends to examine decisions promulgated at a specific point in time

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<sup>1</sup> Alison Harvey. 'Researching "The risks of getting it wrong"', in F. Nicholson & P. Twomey. (eds), *Current Issues of UK Asylum Law and Policy*. Ashgate: Aldershot. Pp. 176-98; TRAC Immigration, 'Immigration Judges'. Report on US Asylum Law and Asylum Process. August [2006]. At: <http://trac.syr.edu/immigration/reports/160/>; James Sweeney, 'The Lure of the Facts in Asylum Appeals', in S. Smith (ed), *Applying Theory and Practice: Issues and Questions for Policy Analysts*. Aldershot: Ashgate [2007].

and/or decisions deposited in public databases. However, as any observer of the courts knows, a large percentage of initial decisions are overturned on appeal. Furthermore, many jurisdictions do not publish or make publicly available their decisions and few researchers have access to the all relevant case material – i.e. the oral evidence, expert reports, the court record, individual case files, legal submissions, etc. – which make it possible to understand how cases were argued and how they were decided.

Nonetheless, in the US and Canada where statistics on judicial decisions are published, researchers have provided a detailed statistical analysis of decision-making at all levels of the asylum process. In the US researchers have concluded that a decision on an asylum claim ‘depends in large measure on which government official decides the claims’ and that ‘the chances of winning asylum’ are strongly affected by the quality of legal representation, the gender of the IJ and the IJ’s work experience prior to being appointed.<sup>2</sup> In his study of judicial review in Canada, Rehaag<sup>3</sup> concluded ‘that outcomes in judicial processes may often turn on factors other than the merits of the case’, notably including ‘the various aspects of the judge’s identity or gender, political party of appointment and political orientation’.<sup>4</sup> Rehaag has also argued that ‘extra-legal factors’ such as whether the claimant had access ‘to experienced legal counsel’ are important.<sup>5</sup>

While decision-making is certainly part of the answer, reliance on statistics and a focus on certain measurable characteristics of a claim or of an IJ’s identity provides an incomplete

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<sup>2</sup> Jaya Ramji Nogales, Andrew Schoenholtz & Phillip Schrag, ‘Refugee Roulette: Disparities in Asylum Adjudication’, *Stanford Law Review* [2007] 60, 2: 295-412

<sup>3</sup> Sean Rehaag, ‘Judicial Review of Refugee Determinations: The Luck of the Draw?’, *Queen’s Law Journal* [2012] 38, 2: 12

<sup>4</sup> In a recent paper, Rehaag analysed all the published decisions of a single, named Canadian adjudicator who refused every appeal he heard. This paper raises troubling issues about the potential ‘bias’ of adjudicators but, given the complex factors discussed in this paper which affect the outcome of appeals, naming the IJ also raises important ethical issues; Sean Rehaag, ‘I Simply Do Not Believe: A Case Study of Credibility Determinations in Canadian Refugee Adjudication’, *Windsor Review of Legal & Social Issues* [2017] 38: 38-70

<sup>5</sup> Rehaag, 2012, n. 3.

and possibly a mis-leading understanding of decision-making. This paper argues that a more comprehensive understanding of judicial decision-making is possible using in-depth ethnographic research which follows litigation, and which analyses the judiciary as one of a number of institutions which operate in a wider political field.<sup>6</sup>

In this paper I focus on a key aspect of IJ decision-making which is a widely recognized problem in all jurisdictions, namely the extent to which IJ's rely on ill-conceived notions of credibility to refuse asylum applications. In this regard, Byrne<sup>7</sup> has argued that 'between 49 and 90 percent of all asylum claims are rejected on the basis of adverse credibility' findings. While recognition of the extent of this problem has prompted the International Association of Refugee Law Judges and UNHCR<sup>8</sup> to publish guidance on credibility assessment, this guidance is not recognized in most jurisdictions.

This paper is based on more than two years of ethnographic fieldwork in the United Kingdom during which I followed asylum-related litigation in the Immigration and Asylum Tribunal, the Upper Tribunal and in the English Court of Appeal. In particular, I followed asylum claims as they moved from an initial interview with the Home Office, to an immigration law office and then to court. In total I followed and analysed a large number of asylum appeals and smaller numbers of country guidance cases, judicial review applications,

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<sup>6</sup> Deborah Anker, 1990. 'Determining Asylum Claims in the US. Summary Report of an Empirical Study of the Adjudication of Asylum Claims by an Immigration Court', *International Journal of Refugee Law* [1990] 2, 2: 252-264; Rebecca Hamlin, *Let me be a Refugee*. Administrative Justice and the Politics of Asylum in the US, Canada and Australia. Oxford: University Press [2014]; XXXXXXXX.

<sup>7</sup> Rosemarie Byrne, 2007. 'Assessing testimonial evidence in asylum proceedings: Guiding standards from the International Criminal Tribunals', *International Journal of Refugee Law* [2007] 19, 4: 610.

<sup>8</sup> International Association of Refugee Law Judges, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive. Judicial Criteria and Standards*. Haarlem: The Netherlands [2013]; UNHCR, *Beyond Proof. Credibility Assessment in EU Asylum systems*. May. Brussels [2013].

appeals heard in the fast track, immigration appeals, bail hearings, oral applications in the Court of Appeal (including two full hearings), and deportation hearings. Following cases allowed me to understand how an asylum applicants' claim was taken, interpreted, translated into the law, argued in court and decided by Judges.

Fieldwork was also conducted in the offices of immigration law firms and barristers' chambers as well as in two departments of the United Kingdom's Border Agency, the Treasury Solicitors Office (now known as the Government Legal Department), eight national refugee organizations, forty NGOs and eleven refugee community organizations. Fieldwork involved reliance on participant observation, taking verbatim notes of all appeals, interviewing the parties to an appeal, accessing case files, analysing documents and interviewing officials.<sup>9</sup> This article also draws on over 30 years of writing expert reports for asylum seekers, a process that has given me access to the complete files of hundreds of asylum applicants.

A focus on litigation has allowed me to understand the work of a range of different institutions and actors whose activities determine the outcome of individual asylum claims and shape UK asylum policy.<sup>10</sup> In this sense, litigation serves as a window into how key actors and institutions operate. Ethnographic research looks beyond individual claims and statistics to understand the broader political processes at work. Fieldwork has revealed what Sally Falk Moore calls 'a semi-autonomous social field' which is constituted by a diverse range of institutions and actors engaged in immigration law and policy: this field generates its own 'rules and customs and symbols internally, but ... it is also vulnerable to the rules and

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<sup>9</sup> The principle of informed consent was followed at all times; unless otherwise specified the names and details of asylum applicants and other parties involved in the cases are anonymized.

<sup>10</sup> XXXXXXXXXXXX

decisions and other forces emanating from the larger world by which it is surrounded'.<sup>11</sup> The field is defined by its processual character; it can generate its own rules and coerce or induce compliance to them. It is an empirically observable field, but one which is clearly linked to other fields in complex ways.

In this article I look at how the claims of unaccompanied asylum-seeking children (UASC) – individuals who, for different reasons, are not allowed to speak at their own hearings – have been determined in the UK between 2001 and 2017. My intention is to illustrate how IJs erroneously arrive at a finding of adverse credibility in these cases. I begin by discussing the hybrid character of asylum adjudication and its implications for assessing evidence, including the credibility of the applicant. The starting point in adjudicating claims is supposed to be Art. I(A)2 of the Refugee Convention or Chap. II of the EU Qualification Directive<sup>12</sup> which state that asylum applicants should be given 'the benefit of the doubt' in the way that their claims are assessed.

The first claim I examine hinged upon 'apparent' contradictions between different statements provided by the applicant; in the second claim adverse credibility findings arose out of the Home Office's cross-examination of the applicant; and the third claim was refused as a result of a failure by the Home Office to submit and assess *all* the evidence before it and by the IJs to hear the appeal even though the applicant was not legally represented. The contrasting decisions illustrate how IJs decide claims and they allow me to draw tentative conclusions regarding how an IJs assessment of evidence/credibility is affected by hybrid legal procedure. Having established the nature of IJ decision-making, I then look at a recent

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<sup>11</sup> Sally Falk More, 'Law and social change: the semi-autonomous social field as an appropriate subject of study', *Law & Society Review* [1972/73] 7: 719-746.

<sup>12</sup> See: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>

case which led the English Court of Appeal to articulate the ‘core principles’ which should be used to assess UASC claims. I conclude that while appellate courts may set out ‘core principles’ that should be used to assess claims, nevertheless most jurisdictions, including the UK, have failed to adopt basic procedural guidelines – this situation allows IJs to rely on their own, arbitrary, understanding of credibility to wrongly refuse asylum claims.

*The effect of hybrid asylum proceedings on decision-making*

It is widely acknowledged that IJ decision-making must be fair and consistent and that decisions should comply with the standards set out in the 1951 Refugee Convention or in related domestic legislation (whether the latter explicitly adopts the Convention or not). It is also generally acknowledged that asylum law and practice is a ‘double hybrid’ because it combines elements and concepts from administrative/penal law with inquisitorial and adversarial procedures.<sup>13</sup> Curiously for a judicial system which is required to assess testimony, few if any jurisdictions have adopted guidelines for assessing credibility. International legal norms state that asylum procedures ‘should satisfy basic requirements’ and provide ‘certain essential guarantees’ to applicants<sup>14</sup>, that an applicant should be given the ‘benefit of the doubt’ and that applications should be considered ‘with anxious scrutiny’<sup>15</sup> to ensure that the host state complies with its obligation not to refoule a refugee.

However, there is abundant evidence that legal procedure in asylum hearings undermines what should be a joint, ‘communicative’ process between the authorities and an applicant to determine an appeal, and that IJs frequently reverse/exaggerate the burden of

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<sup>13</sup> Henrik Zahle, ‘Competing patterns for Evidentiary Assessments’, in G. Noll. Ed. *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*. M. Nijhoff: Leiden. [2005] Pp. 13-26.

<sup>14</sup> UNCHR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees*. Geneva 1992 [1979]. ‘Part Two procedures for the determination of refugee status’, see ¶192-204.

<sup>15</sup> The phrase originated in the judgement of Lord Bridge in *Bugdaycay 1986 AC 514*.

proof on an applicant – in contravention of international legal norms – by requiring applicants to provide corroboration (which is frequently used by IJ’s to argue that an applicant’s claim lacks credibility).<sup>16</sup>

Part of the difficulty in securing protection arises from the way the host-state authority interviews applicants and decides their (initial) application (this aspect of the asylum process is frequently not examined by researchers.<sup>17</sup> Poor decision-making begins at this point because interviewers are inadequately trained to conduct a thorough interview. Indeed, interviews are often hostile and confrontational with the result that applicants are discouraged from providing information that may be crucial to their claim.<sup>18</sup> In addition, state decision-makers work under strict time limits requiring them to rapidly interview and decide claims, a process which gives rise to decisions that fail to assess all the evidence.<sup>19</sup> Critically the interviews and the decision to refuse asylum are submitted to the Tribunal and, unless carefully assessed by the IJ and by counsel for the appellant, may undermine the asylum claim.

*‘Presumptive scepticism’, credibility and conflicting accounts*

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<sup>16</sup> Deborah Anker, ‘Determining Asylum Claims in the US: A Case Study of the Implementation of Legal Norms in an Unstructured Adjudicatory Environment’, *New York University Review of Law and Social Change* [1992/93] 19: 433-457; Zahle 2005 n.13; Aleksandra Popovic, ‘Evidentiary Assessments and Non-Refoulement: Insights from Criminal Procedure’, in G. Noll. Ed. *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*. M. Nijhoff: Leiden. [2005] Pp. 27-56.

<sup>17</sup> See XXXXXXXXX and James Sweeny, ‘Credibility, Proof and Refugee Law’, *International Journal of Refugee Law* [2009] 21, 4: 700-726.

<sup>18</sup> Heaven Crawley, ‘No one gives you a chance to say what you are thinking’: finding space for children’s agency in the UK asylum system’, *Area* [2010] 42, 2: 162-169

<sup>19</sup> Between 2000 and 2007 the Home Office refused between sixty-six and eighty-eight percent of all initial asylum applications per annum (source: FOI Request no. 78760, 1 November 2012). In contrast, between 25 and 50+ percent of Home Office decisions are overturned on appeal.

Anker<sup>20</sup> provided the first in-depth analysis of US asylum procedures based on observations of 200 cases. Her study concluded that ‘the current adjudicatory system remains one of adhoc rules and standards ... there is a significant disparity between the law ‘as stated in the books’, and the law as implemented and practiced’ (p. 255). *Apropos* of the subject of this paper, she found that ‘immigration judges generally expect asylum applicants to produce corroborative proof or testimony that they have directly experienced or visually observed persecutory practices’, and that IJs applied an exaggerated burden of proof and that evidentiary and procedural rules were applied in an adhoc and unpredictable basis (p. 256).

Subsequent research with victims of torture revealed that ‘there are strong grounds for arguing that lack of consistency *per se* cannot be given any negative weight in the assessment of credibility’ and that ‘The normal variability of memory is likely to be exacerbated by ... medical factors ... and a general impairment of recall is to be expected as a result of their traumatic experiences and physical and mental state’.<sup>21</sup>

Byrne<sup>22</sup> identified a number of barriers to communication which impede the effective assessment of credibility by Tribunals. These barriers include errors in translation, problems of interpretation in an oral hearing, mistakes in transcription of serial interviews, and cultural issues which impede translation and evidentiary barriers. Evidentiary barriers include the

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<sup>20</sup> Deborah Anker, ‘Determining Asylum Claims in the US. Summary Report of an Empirical Study of the Adjudication of Asylum Claims by an Immigration Court’, *International Journal of Refugee Law* [1990] 2, 2: 252-264.

<sup>21</sup> Juliet Cohen, ‘Questions of credibility: Omissions, Discrepancies and errors of recall in the Testimony of Asylum Seekers’, *International Journal of Refugee Law* [2002] 13, 3: 308; Guy Coffee, ‘The credibility of credibility evidence at the Refugee Review Tribunal’, *International Journal of Refugee Law* [2003] 13, 3: 377-417

<sup>22</sup> Byrne 2007, n. 7.

weight accorded to preliminary interviews and variations in recall, inconsistency between statements<sup>23</sup> and limited attempts by an IJ to adequately elicit the applicant's full account.

Byrne<sup>24</sup> argued that

'The mechanical application of the four traditional criteria of credibility (demeanour, corroboration, consistency and accuracy) to asylum proceedings will inevitably misguide the fact-finding process ... they also can easily lead to an inaccurate evidentiary record depending upon the fact-finding approach and skills of the interviewer.'

Citing Anker's<sup>25</sup> study of US immigration courts, Bryne<sup>26</sup> notes that immigration judges tend to view asylum claims with 'presumptive skepticism' and that 'skepticism is confused, or seen as a component of, rigorous scrutiny by decision makers'. She argued that decisions which rely on findings of adverse credibility often fail to adequately elicit a full account from the applicant and an IJ's decision tends to conflate core and peripheral issues raised by the claim. This failure occurs when IJs fail to adapt questions to make them 'more culturally assessable' or because of a failure to adequately reframe or use follow up questions to clarify vague or unresponsive answers 'that may be more the result of culture and education than an indicator of truthfulness' (p.17).

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<sup>23</sup> Elsewhere I have documented the process and problems which arise for asylum applicants from asymmetrical Home Office interviews and by poorly trained private immigration case workers, both of whom rely on unqualified interpreters. This process creates multiple statements which contain poorly translated and contradictory statements (XXXX 2017: chapters 4-5).

<sup>24</sup> Byrne 2007: 20, n. 7

<sup>25</sup> Anker, [1992/93], n. 16.

<sup>26</sup> Byrne 2007: 20, n. 7.

Indeed in recognition of the extent to which IJs rely on findings of adverse credibility the International Association of Refugee Judges and UNHCR<sup>27</sup> issued guidance on assessing credibility which discussed the character of decision-making, the legal framework and key guidelines which IJs could adopt in undertaking a more ‘structured approach’ to decision-making and assessing credibility claims. Unfortunately most jurisdictions have not adopted any guidelines and/or where guidelines have been adopted, IJs do not appear to have been trained because they continue to rely on adverse credibility to refuse applications. For instance, in the UK, cuts to legal aid have meant that growing numbers of asylum applicants are not legally represented, that ‘luck’ is involved in terms of having ones’ case heard by a ‘good’ judge or undermined by a poorly trained Home Office Presenting Officer, and that IJ’s do not consistently use the procedural rules available to them to ensure that asylum hearings are fairly conducted.<sup>28</sup> On the other hand in Australia where credibility guidelines exist, IJs experience difficulties in understanding the culture and situation of asylum seekers and make incorrect assumptions about individuals and their evidence which results in negative credibility findings<sup>29</sup> and/or they ‘fill in the gaps’ in a refugees account by making false assumptions which shape their decisions.<sup>30</sup> In the following sections I examine a number of asylum claims by vulnerable UASC heard in the UK which illustrate many of the above identified problems.

#### *How the courts deal with ‘vulnerable’ asylum applicants*

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<sup>27</sup> See n. 8.

<sup>28</sup> Andrew Burrige & Nick Gill, ‘Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals’, *Antipode* [2017] 49, 1: 23–42.

<sup>29</sup> Laura Smith-Kwan, ‘Different in the Same Way? Language, Diversity, and Refugee Credibility’, *International Journal of Refugee Law* [2017] 29, 3: 389-416.

<sup>30</sup> Rebecca Dowd, Jill Hunter, Belinda Liddell, Jane McAdam, Angela Nickerson & Richard Bryant, ‘Filling gaps and verifying facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal’, *International Journal of Refugee Law* [2018] 30, 1: 71-103.

I look first at the tendency to rely upon inconsistencies in an applicant's evidence to refuse an appeal which is evident in many asylum decisions including the case of 'TG'.

*The asylum appeal of TG<sup>31</sup>*

TG claimed asylum in the United Kingdom in 2001 when he was 16 years old. Because he was a child, the Home Office did not interview him though his lawyer was required to submit a completed Statement of Evidence Form (SEF) which provided key information. The Home Office refused TG's asylum appeal, but granted him Exceptional Leave to Remain (ELR) until his 17<sup>th</sup> birthday. TG immediately applied to the Home Office to extend his leave to remain; however the Home Office refused his application which triggered a delayed 2005 appeal that was dismissed by the Tribunal. A reconsideration hearing in 2007 was also dismissed. At this point a different legal representative successfully appealed on the papers to the Court of Appeal which identified serious errors of law by the IJ who initially decided the appeal and it ordered a reconsideration hearing.

The hearing convened at 10:15 am in November 2007. TG's counsel submitted the case law he would be relying upon – '*EB (Ethiopia) [2007] EWCA Civ 809*<sup>32</sup> – and indicated that he would be making an argument under Article 8 of the European Convention of Human Rights regarding 'the right to respect for his private and family life, his home and his correspondence'.

TG was then called to give evidence by his counsel who took him briefly through four statements which were adopted into his evidence. The HOPO<sup>33</sup> then cross-examined TG for

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<sup>31</sup> Source: fieldnotes.

<sup>32</sup> Counsel argued that the Ethiopian authorities had discriminated against TG on the basis of his ethnicity/race and that TG had been deprived of his nationality. However, the background evidence regarding the arrest and deportation of ethnic 'Eritreans' was not explored during the proceedings.

<sup>33</sup> Home Office Presenting Officers are junior civil servants with limited legal training (see XXXXX 2019).

one hour focusing on all aspects of his written evidence. Below I look at five issues which the HOPO explored.

HOPO: In your first statement you say you established contact with an uncle. When was your last contact?

A: About 4 years ago.

HOPO: Were you unable to speak to your mother?

A: Yes.

HOPO: You spoke to your uncle about 5 times. Did you ask if the authorities were looking for you?

A: No.

HOPO: For what reason? It never occurred to you to ask?

A: It was not necessary to ask that question.

HOPO: Were you not concerned that the authorities were still looking for you?

A: I was happy to be here.

HOPO: Did you not ask whether he had any problems given that he stood surety for you?

A: No.

HOPO: Did you ask whether your mother had further problems?

A: No.

HOPO: Can I draw your attention to the earliest statement. It says your brother is 16. Do you remember filling in this form?

A: Yes when I arrived.

HOPO: In 2001. It says there was 1 ½ year difference [in age] between you.

IJ: But you were 16 then, weren't you?

A: When I was making [writing] that I was about 17.

IJ: Be he couldn't have been 16. So that was a mistake, was it?

A: That was a mistake.

Questions were then raised about the restaurant owned by his Eritrean father which had been raided by Ethiopian security in June 1998 (when his father had been arrested), about 'secret meetings' of Eritreans that had occurred there, whether and when it was closed, and TG's work there after he had been expelled from school due to his ethnicity. A few questions were also asked about a subsequent raid on the restaurant when TG and his (Ethiopian) mother, who were the only family members present, were arrested and taken for questioning.

HOPO: You were detained for some time?

A: Yes.

HOPO: You said you were released on 31 June 2000?

A: Yes.

HOPO: There are only 30 days in June.

A: There are discrepancies between the Ethiopian and the European calendar. In Ethiopia each month has 30 days except the 13<sup>th</sup> month which has 6 days ...

IJ: What day of the week were you arrested on?

A: I don't remember.

Questioning then focused on his treatment in detention and what occurred when he was sent to a ‘transition camp’ where he was detained to await deportation to Eritrea. It was at this point that his Ethiopian mother (who had been released from detention) and her brother were said to have secured his release by offering themselves as sureties.

HOPO: They [the authorities] released you for treatment?

A: Yes.

HOPO: Were any bail papers given to your mother or uncle?

A: I don’t know.

HOPO: Were any conditions attached to your release?

A: I have no idea.

[...]

HOPO: Who stood surety for you?

A: I guess my mom and uncle?

HOPO: Don’t guess. Were they the sureties?

A: Yes.

The Bench questioned TG for a further ten minutes about events in the family restaurant and about his fears in the period leading up to his flight from Ethiopia when he was 13 to 14 years old.

The HOPO’s cross examination was unusually thorough, relentless and sometimes off the mark: for example the HOPO argued, based on his own cultural assumptions, regarding what a 13 or 14 year old Ethiopian child could be expected to know (however, Ethiopian children are not confided in by their parents). The HOPOs submissions focused on TG’s

credibility<sup>34</sup>: ‘His account is weak, inconsistent and lacking in details’. The HOPO questioned: why TG seemed unconcerned about the safety of his family? Why TG was arrested and not his mother? Why TG was released from detention? The dates he had given and why he had not approached the Ethiopian embassy in London to secure a passport.<sup>35</sup>

Ten days after the hearing the IJ issued his decision. He began by noting that TG had to show ‘that there was a real risk of persecution as a person who falls within Art. 1(A) of the Refugee Convention’. The decision focused *entirely* on issues of credibility. Thus the IJ began by arguing, following *Karanakaran [2000] Imm AR 271*, that it was the Tribunals’ obligation to ‘evaluate everything material which has been put before it relating to the appellant ...’ Each of the nine paragraphs which set out a finding focused on a discrepancy in TG’s evidence; there was little attempt to look at TG’s evidence in the round against the background of events in Ethiopia in 1998, TG’s age at the time or the fact that at the 2008 hearing TG was asked to recall events that had occurred a decade earlier.

Thus at paragraph 38 the IJ picked up on an apparent discrepancy between the date given in TG’s original SEF form (completed in 2001) that his brother was 16, and TG’s oral evidence that he was 16 and that his brother was 1 ½ years older than him. The IJ concluded that ‘[T]he appellant has at no stage provided either documentary, or medical, proof<sup>36</sup> of age and the Tribunal is not satisfied that a truthful age on entry was claimed.’

Paragraph 39 concluded that TG was unable to explain how his brother ‘came to escape the attention’ of the authorities and was not arrested, even though he too was of

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<sup>34</sup> Many of these issues were addressed in the objective evidence submitted with TG’s claim; the HOPOs questions reflect his assumptions about acceptable behavior by Ethiopian officials etc. rather than an accurate understanding of Ethiopian culture and politics.

<sup>35</sup> As required by case law, see *Bradshaw [1994] Imm AR 359*.

<sup>36</sup> UNHCR (1992) explicitly states that documentary proof is unlikely to be available and that the absence of documents should not be held against an applicant.

‘mixed ethnicity’.<sup>37</sup> Paragraph 40 pursued the same issue: ‘The Tribunal was further troubled by the apparent lack of adverse interest that other relatives of the appellant attracted from the Ethiopian authorities’. The IJ noted that the appellant’s mother was arrested and released after three days, whilst the uncle was not arrested at all. The IJ went on to argue that ‘[T]he explanation offered was that these relatives were both Ethiopian and therefore were not of interest. This explanation lacks plausibility.’<sup>38</sup>

At paragraph 41 the IJ noted ‘a substantial departure in the appellant’s story<sup>39</sup> of the goings-on at the family restaurant from the given account at previous hearings’. Whereas at a previous appeal he had said he was involved in ‘the collecting of monies at the restaurant’, at the 2008 hearing he said that ‘he had absolutely no involvement in the collection of funds at any time’. The apparent discrepancy in the date of his release was also picked up at paragraph 42, i.e. that June only has 30 days, as was his failure to account for a period of 2 months between his release from the transit camp and his departure to the UK. The IJ ‘concluded that the apparently accurate chronology and dating of claimed events could not be relied upon’. The IJ also assumed, without reference to any objective evidence, that TG would not have been released to sureties from the transit camp. Finally the IJ concluded that ‘[T]he evidence of the appellant is riddled with implausibilities and inconsistencies’ and he dismissed the appeal.

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<sup>37</sup> TGs evidence was that his he and his brother were hidden in different places prior to their departure from Ethiopia, and that his brother and uncle were not present at the restaurant when he and his mother were arrested.

<sup>38</sup> As TGs written evidence and oral testimony pointed out, and as the objective country evidence indicated, the Ethiopian authorities did not deport Ethiopian nationals: TG’s mother and uncle were Ethiopian nationals whereas because his father was ‘Eritrean’ the authorities deemed TG to be ‘Eritrean’ due to his mixed-ethnicity.

<sup>39</sup> It is worth noting Cohen’s (2002: 303) conclusion that ‘There are strong [medical, jc] grounds for arguing that lack of consistency *per se* cannot be used to give any negative weight to the assessment of credibility ... The normal variability of memory is likely to be exacerbated by the medical factors reviewed here and a general impairment of recall is to be expected as a result of their traumatic experiences and physical and mental state’.

Problematically the IJ failed to distinguish between core issues, regarding whether there was evidence of persecution for a Convention reason, and peripheral issues relating to conflicting details between earlier written statements and the applicants oral evidence. Also, and as is frequently the case, the decision dealt primarily with a determination of the facts and it did not discuss how the IJ decided definitional and legal questions including the availability of subsidiary protection.

For the vast majority of asylum applicants the first appeal is the end of the road. However, shortly after the Tribunal promulgated its decision TG's counsel submitted an application to the Tribunal to reconsider its decision on the basis that it contained numerous factual errors<sup>40</sup> including that the IJ failed to take account of the age of TG at the time he was arrested and he failed to consider the expert report. However the Upper Tribunal refused to reconsider the appeal. TG's counsel made 'an application on the papers' to the Court of Appeal which was refused<sup>41</sup>, following which he made an 'oral application' which was granted. However at this hearing the Lord Justice took 22 minutes to dismiss the appeal by noting that the case had been heard twice, that he had identified sixteen credibility issues in the claim, that counsel should insist on shorter reports from experts and that fact finding fell to the Tribunal. At this point TG became an illegal overstayer and was subject to deportation.

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<sup>40</sup> In the UK legislation has restricted rights of appeal to material 'errors of law' and refused all appeals based on an IJ's error in determining the 'facts' of a case; see Sec. 101 (1) of the Nationality, Immigration and Asylum Act 2002.

<sup>41</sup> In summing up the case and relevant case law, the application presciently quoted Sedley, LJ in *Araght v SSHD [2006] EWECA civ 973* who stated: 'the now prevalent practice of finding that an applicant is lying because the events described by him are 'implausible' is not attractive and may even be said not to be in intellectually respectable – we all know from our own lives that the improbable and the implausible happen repeatedly – it is the task of the fact finder to decide not whether a particular occurrence or set of occurrences is probable or plausible in the sense that they are unlikely to happen, but whether – however objectively improbable or implausible, it is what did happen – increasingly immigration judges are substituting the former for the latter.'

While the case of TG illustrates the problems that befall applicants seeking to overturn an initial discretionary grant of Leave to Remain, the situation is equally difficult for UASC whose legal representatives have sought to immediately appeal against an initial refusal of asylum by the Home Office. The following cases illustrate the challenges faced by UASC in a slowly evolving policy context which has provided limited assistance to ‘vulnerable’ applicants.

‘FA’ was 15 when he and his younger sister were smuggled out of Eritrea to Sudan from where they travelled to Libya, Italy and into the UK in 2006. He was referred to an immigration caseworker who took his claim, and he and his sister were taken into care. The basis of his claim was that he feared mistreatment by the Eritrean authorities because of his conversion to Pentecostalism, a banned religion. The Home Office refused to grant him Discretionary Leave because he was 17.5 years old,<sup>42</sup> and it refused his asylum claim arguing that he had failed to apply for asylum in a safe ‘Third Country’ (i.e. Italy or France) and that he demonstrated no knowledge of Pentecostalism (UK 2006).

His appeal<sup>43</sup> was heard by the Tribunal in 2008 and it began with his counsel asking him to confirm his written statements. The HOPO cross-examined FA for two hours<sup>44</sup> (the IJ briefly adjourned the hearing to allow the boy to compose himself). The IJ also intervened to ask FA to listen carefully to the questions and he repeatedly asked the HOPO to rephrase his questions so that they could be more easily interpreted and understood by FA. When the HOPO was unable to formulate a clear question, the IJ rephrased the question for him.

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<sup>42</sup> See API ‘Processing an asylum application from a child’ (revised in 2007) at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257469/processingasylumapplication1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication1.pdf)

<sup>43</sup> Source: fieldnotes.

<sup>44</sup> Bingham (2000: 38) approvingly quotes a decision by Lord Wilberforce that ‘...the English style of examination and cross-examination – it is not a good way of getting at the truth or persuading the tribunal.’

Indeed, the IJ asked his own questions to clarify information. It was clear that FA struggled to understand the questions he was being asked by the HOPO and that he found the proceedings difficult to deal with (for example he failed to answer some questions, and throughout the proceedings he was hunched over with his head in his hands).

The HOPO summed up his argument by arguing that FA should be refused asylum as follows (he sought to take advantage of the boy's inability to answer his questions):

'He has patently not told the truth and on a number of occasions his claim is false. The contradictions in his account goes to the core of his claim and when taken accumulatively justify an adverse credibility finding. There are contradictions<sup>45</sup> about his account of prison/detention in Asmara, about his parent's religion, his father's occupation, the length of time spent in prison. the date of his detention [...] There are three different accounts of his flight with different dates [...] He has a poor knowledge of religion and Pentecostal Christianity. The expert report does not take us very far [...] I ask you to dismiss the appeal.'

In his decision, the IJ found that FA had 'been through very difficult experiences... I find that those experiences, coupled with his youth, provide a satisfactory explanation' for the discrepancies identified by the HOPO. The IJ decided that FA had a well-founded fear of persecution and granted him asylum. It took 18 months for FA to secure status. This decision starkly contrasts to the tenor of TG's appeal and can only be explained by the fact that the IJ found that FA was a credible witness.

The case of SGY<sup>46</sup> illustrates the value of access to experienced counsel. SGY arrived in the UK in 2008 and claimed asylum. The Home Office interviewed her and rejected her

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<sup>45</sup> FA was interviewed twice by the Home Office. The HOPO adopted the Home Office Refusal Letter in arguing his case. I do not have access to FA's Home Office interviews.

<sup>46</sup> The appeal was anonymized as Ms SGY, appeal number PA/06426/2016. I have the case file and provided an expert report but did not observe the appeal.

application. At her appeal she was not legally represented, however the IJ decided to hear her appeal which he refused on the basis of adverse credibility findings on all of her evidence.<sup>47</sup> In 2011 she filed a fresh asylum application seeking to challenge the Tribunal's decision (which the Home Office failed to respond to). In 2015 the Upper Tribunal granted her leave to challenge the Tribunal's decision.

At her 2017 appeal the applicant submitted further evidence<sup>48</sup> regarding her religious beliefs as a Pentecostal Christian<sup>49</sup> and it was found that the IJ in her initial appeal had determined her appeal without the benefit of key documents that the Home Office should have made available regarding her 'vulnerability' and her age.<sup>50</sup> An expert report assisted the IJ to ascertain that SYG was a national of Eritrea<sup>51</sup> and that she would be at risk for a Convention reason<sup>52</sup> if she were to be returned there. The IJ granted her asylum appeal and accepted that her claim was also successful under Art. 2 and 3 of the ECHR.<sup>53</sup> SYG's claim

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<sup>47</sup> The position which the IJ adopted in this case strongly suggests that he was not sufficiently protective of her procedural rights and that he deferred to the Home Office through his cross-examination of the appellant by focusing on her credibility. He clearly failed to establish his independence from the Home Office (see Anker's 1992/3 analysis of this issue in the US courts).

<sup>48</sup> The ability to reassess the IJ's decision on her first appeal was supported by case law which included the need to assess the case with 'anxious scrutiny' (*Musisi [1978] AC 514 [531]*).

<sup>49</sup> Indeed as the IJ on her second appeal observed, Home Office assessment of her SEF record focused on her travel document, which was known to be false, while ignoring the correct answers she provided about her religious faith.

<sup>50</sup> Including information indicating that she *was* a minor on entry into the UK (the Home Office had not submitted the age assessment to the court). Her fresh application included medical and other evidence of ongoing difficulties with severe depression indicating that she had probably experienced trauma (she claimed to have been raped) and had probably been trafficked (which she had also claimed).

<sup>51</sup> At her initial appeal the Home Office argued, and the IJ concluded, that she was an Ethiopian national because she entered the UK with a false Ethiopian passport. No expert evidence was submitted to the court at this appeal.

<sup>52</sup> Because she was a Pentecostal Christian who had illegally exited Eritrea.

<sup>53</sup> Art. 2 concerns an individual's right to life and states: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.' Art. 3 concerns the prohibition of torture: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

had taken eight years to resolve.<sup>54</sup> Persistence and access to good legal counsel made it possible for SGY to make a successful fresh asylum application which rejected the Home Office decision and overturn a poorly decided initial appeal.

In September 2014, ‘NY’<sup>55</sup>, a 15-year-old Eritrean child, arrived in the UK. He claimed to have been arrested and detained by the military which had attempted to forcibly conscript him. Following escape from prison, NY and another boy walked four days until they entered Ethiopia and were taken to a refugee camp. About six months later he joined a group of men travelling to Sudan. However, they were caught by traffickers and taken to Libya where they were imprisoned and ill-treated. Eventually he was taken to the port and put on an overcrowded boat that was rescued by the Italian navy. From Italy he travelled to France and reached England where, after being intercepted by the police, he applied for asylum.

Following his initial Home Office interview, he was disbursed to accommodation in London. The Home Office refused to grant him asylum, but it did grant him Discretionary Leave until he was 17.5 years-old. NY’s case worker instructed a barrister to handle his appeal; she also instructed a medical expert to assess his health and a country expert to assess Home Office policy and political conditions in Eritrea. NY’s appeal was heard by the Tribunal in November 2015. Because of his age and the fact that he was diagnosed with severe Post-Traumatic Stress Disorder, moderate depression and anxiety, the Tribunal was asked by NY’s counsel that conduct of the hearing be governed by Guidance Note. 2 of 2010 (see Box A, below).<sup>56</sup>

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<sup>54</sup> SGY may have been destitute and homeless for part of this period.

<sup>55</sup> Source: fieldnotes.

<sup>56</sup> See: <https://www.judiciary.gov.uk/wp-content/uploads/2014/07/ChildWitnessGuidance.pdf> (accessed on 5 April 2016). A noticeable omission from the list includes individuals who have been held in detention/prison for prolonged periods and individuals who have experienced torture and/or rape.

At his hearing NY confirmed the written evidence that he was relying upon and answered seven agreed questions which were put to him in cross examination by the HOPO. His counsel did not re-examine him, and the IJ did not ask any questions. The HOPO sought to challenge the credibility of parts of NY's account. However, following the Guidance Note, the IJ dismissed the challenge in light of the medical report, NY's age and objective background evidence. The country expert's report challenged the evidential basis of current Home Office policy and argued that it was not sufficiently credible as to overturn existing case law. In considering all the evidence before her, the IJ granted NY asylum. His case took 16 months to be concluded. Unfortunately, only a small number of 'vulnerable' applicants benefit from Guidance Note no. 2 because their lawyers, and IJs, fail to invoke it prior to the appeal. Why does this occur? In part it reflects the problems involved in defining and identifying who is and is not 'vulnerable',<sup>57</sup> but it also reflects a general refusal by policy makers to admit just how difficult it is for asylum seekers to secure protection.

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<sup>57</sup> A problem slowly being addressed in criminal law, see Jessica Jacobsen, 'Balancing accessibility and authority: Towards an integrated approach to vulnerability in the criminal courts', in P. Cooper & H. Norton. Eds. *Vulnerable People in the Criminal Justice System. A Guide to Law and Practice*. Oxford: University Press [in press].

**Box A. Joint Presidential Guidance Note. 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance’ (summary)**

The Guidance Note states in part:

1. That ‘mental health problems, social or learning difficulties, religious beliefs and practices, sexual orientation, ethnic social and cultural background, domestic and employment circumstances physical disability or impairment ... may affect the giving of evidence’.
2. ‘As far as possible potential issues and solutions should be identified at a Case Management Review Hearing or pre-hearing review and the case papers noted so that the substantive hearing can proceed with minimal exposure to trauma or further trauma of vulnerable witnesses or appellants’. In short proper arrangements should be agreed before the appeal and put in place during the appeal, etc.
3. ‘Identify and record potential behavioural challenges or difficulties, consider and record appropriate hearing room arrangements and whether the appellant is legally represented. If not, consider whether an adjournment is required’.
4. ‘Consider whether expert evidence e.g. as to disability, age or mental health is required, particularly if there is a dispute over the person’s ability to participate in the proceedings; consider whether an adjournment would be appropriate to enable either party to obtain reports. Relevant policies and practices relied upon by either party should be disclosed e.g. protocols for victims of trafficking, interview protocols. Ensure adequate focussed and effective directions are issued’.
5. Schedule sufficient time to allow for frequent breaks to ensure concentration etc. and ensure that everyone in the hearing room is introduced to the appellant.
6. Provide an adequate explanation of the hearing process and the issues at stake to the appellant.
7. The appellant’s representative or supporting adult should exercise their responsibility to ensure the applicant’s wellbeing and that s/he understands what is happening.
8. The public is excluded.
9. To avoid retraumatizing vulnerable applicants, improper or aggressive cross examination is curtailed to ensure that questioning does not constitute harassment, intimidation or humiliation and that questions are asked in a manner appropriate to the appellants age, maturity, level of understanding etc.

*The ‘gap’ between evolving ‘core principles’ and IJ practice*

There can be no doubt of the need for the appellate courts to restate and redefine the core principles which IJ’s should follow in determining a claim. One such opportunity occurred in early 2017 when the English Court of Appeal heard an appeal from AM,<sup>58</sup> a fifteen yearold Afghan boy with documented learning difficulties. AM arrived in the UK in July 2012 and

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<sup>58</sup> See: *AM (Afghanistan) and SSHD and Lord Chancellor; [2017] EWCA Civ 1123*. I rely on the determination only.

applied for asylum. In May 2013 the Home Office refused AM asylum but granted him Discretionary Leave until he was 17.5 years of age because: (a) his evidence was not credible due to inconsistencies; (b) he had failed to claim asylum in another safe EU country (which was taken to mean that he had not fled Afghanistan in fear of his life); and (c) he had not demonstrated risk to his life and could obtain assistance from the Afghan authorities if he were returned.

The appeal raised a number of important legal issues: the grounds on which refugee status should be granted,<sup>59</sup> the grounds on which humanitarian status should be granted (and specifically that recognition should be given to the welfare of a child)<sup>60</sup> and Art. 3 of the ECHR. However the IJ only made limited use of Guidance Note no. 2 (discussed above) to regulate the appeal and he failed to consider whether AM would be able to effectively participate in the hearing. The IJ ignored medical evidence which concluded that because AM had ‘moderate learning difficulties’ that he should not be required to provide oral evidence at the hearing.

The IJ refused the appeal based on ‘inconsistencies’ in AM’s oral evidence and his inability to answer ‘simple questions’ about his past life. The IJ found that there was ‘no reason why the appellant should not return as an adult to the area where his relatives are’, and that AM’s failure to claim asylum in Austria and his inability to demonstrate the risks he faced in Afghanistan etc. undermined his claim. When the decision was appealed to the Upper Tribunal, that body merely stated that the Tribunal ‘was entitled to make the

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<sup>59</sup> See Immigration Rule 334.

<sup>60</sup> See Immigration Rule 339C and Rule 341 which states that: ‘... account should be taken of the applicant’s maturity and in assessing his claim more weight should be given to objective indicators of risk than to the child’s state of mind and understanding of their situation ... Close attention should be given to the welfare of the child at all times.’

credibility findings that it had, and that the Tribunal had taken full account of the appellant’s learning difficulties.’

By the time the case reached the Court of Appeal, counsel for AM and for the Home Office had agreed that the appeal should be allowed on all grounds.<sup>61</sup> Even so the Court set out a detailed analysis of the material errors of law made by the IJ and it articulated a set of ‘core principles’ based partly on publicly available documents<sup>62</sup> relevant to children and young people. The ‘core principles’ enunciated by the Court were intended to guide the assessment of asylum claims made by ‘children, young people and other incapacitated or vulnerable persons whose ability to effectively participate in proceedings may be limited’. The core principles, which are relevant to all jurisdictions, are set out in Box B (below).

- Box B. ‘Core Principles’**
1. Assessment of personal credibility is not a substitute for application of the criteria for refugee status, it must be holistically assessed.
  2. The conclusions of medical expert’s findings must be treated as part of a holistic assessment.
  3. Medical evidence could be critical in explaining why an account might be incoherent or inconsistent.
  4. Credibility must be judged in the context of the known objective circumstances and practices of the relevant state.
  5. The highest standards of procedural fairness were required.

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<sup>61</sup> In addition to ignoring the psychologists report and failing to make adequate arrangements to allow AM to participate effectively in his appeal, the IJ also failed to address the objective evidence on Afghanistan and the appellant’s evidence regarding the reasons why he fled the country.

<sup>62</sup> The documents are: (a) UNHCR Guidelines on International Protection: Child Asylum Claims under Art. 1(A)2 and 1(F) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees; (b) Art. 4(3) of Directive 2004/83/EC [the Qualification Directive]; (c) ‘Every Child Matters – Change for Children (Statutory guidance for the UK Border Agency on making arrangements to safeguard and promote the welfare of children, November 2009); (d) Paragraphs 350 to 395 of the Immigration Rules and the Secretary of State’s Policy Guidance (Processing Children’s Claims, 12 July 2016); and (e) the Equal Treatment Benchbook, Chap. 5, Judicial College, 2015.

While underlining the importance of procedural fairness, the Court of Appeal missed an important opportunity when it failed to explicitly address the problems caused when IJ's reverse the burden of proof on to applicants. The court could have initiated a consultation on the adoption of appropriate standards for assessing asylum testimony and on the role that IJs could play in proactively identifying and redressing 'potential distortions in testimony that arise from cultural, psychological, education and distance barriers' which characterize' asylum and human rights testimony.

It should be clear that the Tribunal and Upper Tribunal made serious errors of law in their handling of this appeal because they disregarded existing procedural guidance and they confused a search for truth in an asylum applicant's account with a careful assessment of whether the applicant had a well-founded fear of persecution.

### *Conclusions*

In my examination of asylum claims I have not attempted to provide a detailed critique of the failures in each case which were made by *all* the actors – Home Office officials, IJs and lawyers – involved. It should be clear, however, that *all* actors and not just IJs contribute in different ways to erroneous decisions on asylum claims. What my analysis does indicate, however, is the consistent failure of IJ's to ensure procedural fairness during an appeal, to accurately assess the facts – an admittedly difficult task – and to decide asylum claims in a just manner and in accord with the Refugee Convention. To paraphrase a well-known statement, this paper has demonstrated that like cases are *not* treated alike (a finding which the statistical analyses of determinations clearly indicates). This problem is particularly acute for child applicants because, in many cases, they are not interviewed nor are they allowed to speak at their appeals (nor has an independent 'litigation friend' been appointed to advise them throughout the asylum process).

Rather than focus on specific errors committed by IJs in each case, it should be clear that adverse credibility findings arise from an inconsistent understanding of how to assess evidence, particularly evidence relating to credibility. This occurs in part because, without formal guidance and training, IJ's tend to reverse/exaggerate the burden of proof<sup>63</sup> by requiring applicants to provide corroboration for their claim. Nearly as important, IJ's tend to pursue a mechanical application of the standard criteria for assessing credibility at the expense of eliciting a full account from the applicant or indeed without assessing the medical and objective country evidence. This approach to fact-finding creates evidential barriers for an applicant because poorly elicited accounts mean that not all the relevant information is available to be assessed. IJ assessment of the evidence often confuses the difference between core and peripheral issues in a claim, and decisions may be based in part on the IJs unstated cultural assumptions and/or subjective views rather than a careful elicitation and assessment of all the facts of the case. For these reasons a 'sceptical' approach to fact-finding leads many IJs to wrongly refuse a claim based on his or her assessment of the personal credibility or demeanour of an applicant.<sup>64</sup>

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<sup>63</sup> Elsewhere I have examined how the UK Tribunal makes use of the extensive number of Procedural and Practice Directions in deciding all types of claims (XXXXX 2018: Chap. 5). See also Gill et al (2017).

<sup>64</sup> Rehaag's analysis of the decisions of one Canadian IJ who refused nearly all of 172 appeals he heard raises important policy considerations. As he argues: '**If** one begins with the assumption that some degree of subjectivity in adjudication **is** inevitable, then the key question to ask about **high** stakes adjudication is not how to eliminate adjudicative subjectivity. Instead, it is necessary to consider how its pernicious effects can be minimized. Asymmetric procedural rules are an especially promising way to do this. Such asymmetries involve making policy choices about what type of outcomes are most important to avoid, and then setting up rules that reduce the likelihood of those outcomes. Thus, for example, in Canadian criminal law, there is a strong policy preference for minimizing false positives ... There are good reasons for a similar type of policy preference in the refugee law context whereby false negatives (which can be understood from this perspective as refusing refugee protection when most adjudicators would grant protection) should be minimized even **if** this increases the likelihood of false positives (which can be understood as granting refugee protection when most adjudicators would refuse protection). False-negative refugee determinations may result in refugees being deported to face persecution, torture, or death.' [emphasis in the original]; Rehaag, 2017, n. 4.

The Court of Appeal decision in ‘AM’ is important because, since relatively few asylum cases are reviewed by an appellate court, it sets our ‘core principles’ which should be used by British IJs to assess all asylum claims made by ‘vulnerable’ applicants. If this situation exists in the UK where judicial standards are arguably relatively high, what must the situation be in other jurisdictions where it is difficult to appeal or have a decision judicially reviewed? On a cautionary note, Rehaag’s<sup>65</sup> research suggests that we may not want to place too high a value on judicial review to ensure that decisions are procedurally fair. The fact that nearly all asylum applicants only get one chance to have their case heard is an urgent reminder of the need to decide the first appeal correctly.

What are the costs of wrongly deciding asylum claims? First, individuals may be refouled back to their country of origin, or indeed sent to a ‘safe third country’ where judicial standards and access to justice may be of a lower standard, to confront persecution. Second, assuming that applicants can appeal against a wrongful decision, individuals may spend years living destitute until they are recognized as a refugee. Third, poor decision-making is not only financially costly in terms of the resources required to pay for appeals and fresh asylum applications etc., poor decisions also undermine the legitimacy of the courts.

These observations bring us to the notion of judicial discretion. In discussing criminal law where a higher standard of legal practice prevails, Lord Bingham (2000) argued that judges should undertake a thorough and fair process of fact-finding. It is only *after* the facts of a case have been carefully established, he argued, that a judge exercises discretion in choosing a specific course of action. Yet as Byrne (2009) noted over a decade ago, Tribunals have failed to adopt appropriate evidentiary standards to assess the testimony of individuals seeking asylum. This situation is clearly unacceptable because it leaves it open to IJs to

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<sup>65</sup> Rehaag 2012, n. 3.

decide a case without undertaking a proper assessment of the evidence; in short arbitrary standards continue to be used to assess evidence/credibility which undermines procedural fairness.

Finally, it should be clear that an understanding of judicial decision-making cannot rest on the statistical analysis of published decisions (which often do not set out key aspects of legal reasoning). I have argued that research which looks only at published decisions is fundamentally flawed, and that an ethnographic analysis of the entire asylum process provides an accurate sense of how IJs reach decisions in asylum claims (a task which does require a range of research methods and access to types of data which can and should be quantitatively analysed). I have also argued that the work of IJs constitutes but one, albeit important, part of the asylum process which needs to be examined. Credibility assessment is a complex and difficult task, and while it is not possible to achieve consistency in all asylum claims, it is right that that RSD processes in all jurisdictions should adopt international guidelines on assessing credibility and that all IJs should be trained to undertake a 'structured approach' to decision-making using procedural rules and guidance that will allow them to arrive at fair decisions.